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ALVARO JIMENEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ALVARO JIMENEZ, an individual,

Case No. 4:17-cv-01624-KAW

Plaintiff,

v.

PLAINTIFF'S RESPONSE IN
OPPOSITION TO RULE 12 MOTION
TO DISMISS FILED BY
DEFENDANT SLM PRIVATE
EDUCATION STUDENT LOAN
TRUST 2011-A

SLM PRIVATE EDUCATION
STUDENT LOAN TRUST 2011-A;
LAW OFFICES OF HARRIS & ZIDE,
a California Unincorporated
Association; and FLINT C. ZIDE,
individually and in his official
capacity; and DOES 1 through 10,
inclusive,

Defendants.

Date : 09/21/2017
Time: 11:00 a.m.
Loc'n: 1301 Clay St., Oakland CA
Judge: Kandis A. Westmore

Plaintiff ALVARO JIMENEZ, by and through his attorney, James A. Michel,
respectfully submits this Response Memorandum of Points and Authorities in
opposition to the Rule 12 motion to dismiss plaintiff's complaint, filed by
Defendant SLM PRIVATE EDUCATION STUDENT LOAN TRUST 2011-A:

I. INTRODUCTION

Defendants' motion to dismiss is based on grounds that the Complaint
should be dismissed for insufficient process and service of process (Fed. Rules Civ.
Proc., Rule 12, subd. (b)(4) and (5)) and that it fails to state a claim upon which
relief can be granted (Fed. Rules Civ. Proc., Rule 12, subd. (b)(6)). Defendants thus

1 first request that the court dismiss for lack of jurisdiction and then ask that the
2 Court address the merits of the case.

3 Defendant's arguments as to jurisdiction (Rule 12, subds. (b)(4) & (5)) are
4 without merit as plaintiff will show that defendant is a Delaware Statutory Trust
5 and can be sued in its own name. Plaintiff hopes to have obtained an order from
6 the Court extending the time to serve SLM because plaintiff has finally found the
7 service address for SLM's registered agent for service of process, as shown in
8 plaintiff's administrative motion to extend time, filed 8/4/2017 (Doc# 28).

9 Defendant's arguments as to the merits are strange given the litigation which
10 has already taken place between the parties. Defendant SLM has produced
11 documents in the underlying state court litigation which contain the bases for
12 plaintiff's allegations. This opposition will show that by reference to the lawsuit
13 filed by SLM in state court, plaintiff's complaint has provided the factual frame of
14 reference to provide SLM with fair notice of the claims against it and to "state a
15 claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678
16 (2009).

17 **II. LAW AND ARGUMENT**

18 **A. The Summons and Complaint Name the Correct Party**

19 Defendant argues that SLM is an express trust and does not have capacity to
20 be sued, but that its trustee must be named as a party.

21 On the contrary, public records show that SLM is a Delaware Statutory Trust
22 (or "business trust") which is treated as a corporation under Delaware law and may
23 sue and be sued in its own name. (See 12 Del. C. § 3804(a).)¹ California law has
24 recognized the existence of this type of "business trust" in published decisions such
25

26 ¹ Under the Delaware Act, a statutory trust may sue and be sued for debts,
27 obligations or liabilities incurred by trustees or their agents, and for damages to
28 persons or property resulting from their negligence in performance of their
respective duties under the governing instrument of the trust. 12 Del. C.
§3804(a).

as *Portico Management Group, LLC v. Harrison*, 202 Cal. App. 4th 464, 475 (2011) and *Jensen v. Hugh Evans & Co.*, 18 Cal.2d 290, 301-302 (1941).

Please see, attached to Declaration of James Michel in support of this Response, Exhibit C, which is a true copy of printout from the Delaware Secretary of State's website for the Division of Corporations from 8/4/2017, showing that SLM is a statutory trust under Delaware law and that its Registered Agent for Service of Process is identified as "BNY Mellon Trust of Delaware."

As a result, SLM may be served via its registered agent and a trustee need not be added as a party. As to the fact that SLM is named in this complaint with the word "Student" in it, whereas that word is not in the name shown in Delaware's public records, SLM has waived that argument by not raising it in its motion, perhaps by relying on Navient's misnaming the entity in its Monthly Servicing Report of April 2016. (See Exhibit B, attached to Declaration of James Michel, filed herewith.)

B. Standard on Motion to Dismiss under Rule 12(b)(6)

Under Rule 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must give the defendant "fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). The plaintiff's allegations must be accepted as true, the complaint must be read "as a whole," and all reasonable inferences must be drawn in plaintiff's favor. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1323 (2011). And "of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atlantic v. Twombly*, *Ibid.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

C. The Complaint States A Cause of Action Under FDCPA

1. The Court Should Consider Documents Outside the Complaint for purposes of this Rule 12 motion

Under certain circumstances, a court may consider material outside the complaint for purposes of a Rule 12 motion to dismiss. *Branch v. Tunnell* (9th Cir. 1994) 14 F.3d 449, 454. The complaint refers to certain documents which are in the possession of defendant SLM because they were produced to plaintiff in connection with the underlying state court litigation. As such, plaintiff is informed and believes that SLM will not contest the genuineness of the documents.

2. Plaintiff States a Cause of Action by Alleging That SLM Cannot Substitute a Cause of Action for Common Counts Where it Supposedly Has Evidence of a Promissory Note

In paragraph 20, plaintiff's complaint alleges that SLM has no cause of action in the underlying state court case because the existence of a promissory note precludes SLM's ability to proceed on a theory or common counts, such as open book account or account stated.

"An express contract, which defines the duties and liabilities of the parties, whether it be oral or written, is **not**, as a rule, an open account." (*Durkin v. Durkin* (1955) 133 Cal.App.2d 283, 290 (emphasis added).)

Moreover, a creditor cannot create a debt by simply sending a statement and claiming it is an "account stated." In other words, the common counts cause of action does not create liability where no other indebtedness can be established. *Hemenover v. Lynip* (1930) 107 Cal.App. 356, 363.

As a result, SLM's state court case will be dismissed.

3. Plaintiff States a Cause of Action by Alleging That SLM Cannot Prove the Right to Collect the Underlying Alleged Debt

Paragraph 22 of plaintiff's complaint alleges several facts on information and belief which have been borne out by SLM's production of discovery responses in the state court case. For one, SLM has no documents to show that the alleged debt

1 to Sallie Mae was ever assigned to SLM. SLM does not even have documents to
2 show who the original lender was, much less anything showing how the loan was
3 ever assigned to SLM. See Exhibit G to the Declaration of James Michel in support
4 of this Response, which is a true copy of the first page of a purported Promissory
5 Note produced by SLM in the state court litigation. There is only a blank where the
6 Lender should be identified.

7 See also SLM's response to Request for Production No. 5 in Exhibit D to the
8 Declaration of James Michel. In response to a request for documents evidencing
9 assignment (See Exh. E to Decl. of James Michel), SLM responded that it would
10 provide copies of the promissory note, terms and conditions, and statement of
11 account. SLM has no evidence of assignment.

12 ***4. Plaintiff States a Cause of Action for Failure To***
13 ***Comply with Cosignor Disclosure Requirements***

14 Defendant SLM does not deny that plaintiff was not presented with adequate
15 cosignor disclosures complying with applicable federal regulations and state
16 statutes but instead suggests that plaintiff might have been married to the
17 borrower which would defeat the cause of action.

18 This argument is shown to be absurd if one can consider the copy of the loan
19 application which SLM provided to plaintiff in state court litigation, attached as
20 Exhibit F to the Declaration of James Michel filed in support of this Response.
21 SLM's own record shows that the Borrower, one Mario Jimenez, was a resident of
22 the State of Florida and that plaintiff, a resident of the State of California, was a
23 "relative" of the Borrower. Nowhere does it state that the Borrower and his
24 cosigner were married.

25 Alternatively, should the complaint be found to inadequately inform SLM of
26 the claims plaintiff is asserting, plaintiff prays for leave to amend so long as it is
27 understood that SLM is requesting that plaintiff explain to SLM the contents of the
28 documents it produced in state court.

III. CONCLUSION

Defendant's objections to jurisdiction over the person should be overruled, and its motions under Rule 12, subds. (b)(4) & (5) should be DENIED, because public records show that SLM is a Delaware Statutory Trust and can be served via its registered agent, BNY Mellon Trust Company of Delaware. Plaintiff hopes that the Court will extend the time for plaintiff to serve SLM as a result of the administrative motion filed 8/4/2017.

As to SLM's motion pursuant to Rule 12, subd. (b)(4), that it has not been provided an adequate set of facts to understand how it violated fair debt collection statutes, the complaint already provides SLM with the factual nexus surrounding the deficiencies with its state court claims against plaintiff and that it does not have even a substantial compliance argument as to the cosigner disclosures. The motion to dismiss for failure to state a claim upon which relief can be granted should be DENIED.

Alternatively, plaintiff seeks leave to amend.

DATED: August 5, 2017

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